No. 76-545

In the Supreme Court of the United States

OCTOBER TERM, 1976

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the court of appeals (A14-A25) is reported at 538 F.2d 915. The opinions of the district court (A1-A13) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1976. A petition for rehearing was denied on

September 1, 1976. The petition for a writ of certiorari was filed on October 18, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Is intervention by an excluded class member after final judgment in order to appeal an erroneous order refusing to allow an employment discrimination case to proceed as a class action barred by *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974), when it does not become apparent until after final judgment that the named plaintiffs would not appeal?

STATEMENT

Prior to November 1968, petitioner United Air Lines discharged female but not male flight attendants who married. The illegality of this sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., was established on an interlocutory appeal on the issue of liability in *Sprogis* v. *United Air Lines,* 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971).

This case was commenced as a class action on behalf of all terminated stewardesses on May 15, 1970, during the pendency of the appeal in *Sprogis* which had been brought as an individual action. Following exhaustion of appellate review in *Sprogis,* the district court refused to convert that case into a class action, without prejudice to consideration of class treatment in this case. 56 F.R.D. 420 (N.D. Ill. 1972). Six months later, on December 6, 1972, the district court refused class treatment in this proceeding as well. (A3). Although plaintiffs were given a certificate under 28 U.S.C. §1292(b), permission to appeal this ruling was denied by the court of appeals on December 27, 1972, Misc. No. 72-8117. (A8, A14 n.3). Thereafter, partial summary judgment as to certain plaintiffs was granted, and the parties negotiated settlements. On October 3, 1975, the court entered final judgment. (A9-A12).

Respondent Liane Buix McDonald is a discharged stewardess who was excluded from participation in this case by the district court's order refusing to allow it to proceed as a class action. Two weeks after final judgment was entered on October 3, 1975, McDonald learned that the plaintiffs had decided not to seek review of the adverse class determination. (A15). That day she served and filed in the district a petition to intervene after judgment for the purpose of appealing the adverse class determination. The motion was presented four days later, on October 21, 1975, and was denied. (A15). Respondent then filed timely notices of appeal from the October 21, 1975 order denying intervention and from the October 3, 1975 final decision insofar as it made final and appealable the adverse class determination.

The court of appeals, one judge dissenting, reversed and remanded the case with directions to permit intervention and to fashion relief for the class.[1]

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[1] The court of appeals held that intervention was timely and should have been permitted under Federal Rule of Civil Procedure 24(b) as permissive intervention. The court of appeals did not reach respondent's argument that intervention was also appropriate under Rule 24(a) as a matter of right. Nor did the court of appeals reach respondent's argument that, under the circumstances of this case, she had standing to file a notice of appeal even without intervening.

ARGUMENT

The sole ground asserted as a basis for this court's review is the claim (Pet. 7) that the decision below is in "direct conflict" with a prior decision of this court, *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974).[2] Petitioner United Air Lines reads *American Pipe*, which held that the statute of limitations was tolled at least until class status was denied, as barring an ultimately successful appeal of that denial by an excluded class member who had intervened to obtain appellate review.

In fact, *American Pipe* does not address the question presented here: the circumstances under which a class member may intervene after judgment solely for the purpose of challenging the denial of class status, a denial in which the class representatives did not acquiesce until

[2]Aside from its claim that the statute of limitations has run, petitioner does not challenge the correctness of the decision below that respondent's application was timely under Rule 24. (A17). Following this Court's direction in *NAACP* v. *New York*, 413 U.S. 345, 366 (1973), to consider all of the circumstances in determining the timeliness of intervention, the Seventh Circuit considered the lack of prejudice to petitioner, the interest of respondent in obtaining class treatment, the purposes of Title VII of the Civil Rights Act and the promptness of her intervention as soon as it became apparent that the named plaintiffs would not appeal and that the representation of her interests no longer was adequate. (A16-19).

Nor does petitioner challenge the correctness of the decision below that the district court had erred in refusing to allow the case to proceed as a class action. (A19-20). These questions are therefore not before the Court. E.g., *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U.S. 116, 121 n.6 (1974), *Namet* v. *United States*, 373 U.S. 179, 190 (1963).

after judgment. (A15). In *American Pipe*, the Court was faced with intervention for an entirely different purpose. In that case the district court had refused to allow the case to proceed as a class action, and the persons excluded from the case sought to intervene to become co-plaintiffs, acquiescing in the district court order denying class status and seeking to litigate only their individual claims—as individuals, not as representatives. The Court held that for the purpose of prosecuting individual claims as a co-plaintiff or as a plaintiff in an independent action, the statute of limitations is tolled during the pendency of the class action. As Mr. Justice (then Judge) Stevens noted in *Jimenez* v. *Weinberger*, 523 F.2d 689, 696 (7th Cir. 1975), there was no need for the Court to consider in *American Pipe* whether the statute of limitations would continue to be tolled if the putative class representative had appealed from the adverse class determination.

Here the issue turns not on whether Ms. McDonald can now independently pursue her individual claim in this suit or elsewhere.[3] It turns on whether she and the other members of the class after final judgment are to be de-

[3] On November 2, 1976 this Court granted certiorari in *United Air Lines* v. *Evans*, No. 76-333, 45 U.S.L.W. 3329. Ms. Evans had "involuntarily resigned" as a United Air Lines stewardess in 1968 in response to United's no-marriage rule. Pet. for Writ of Certiorari, *United Air Lines* v. *Evans*, at 3. She is thus a member of the plaintiff class in the present case. However, after the district court had erroneously denied class treatment and excluded her from this matter, she filed a charge of continuing discrimination with the EEOC and then instituted her own individual action. Although it arises ultimately from the same discriminatory policy, *Evans* is otherwise unrelated to this case. *Evans* involves the question of whether a rehired employee who has lost seniority is a victim of continuing discrimination, a far remove from the timeliness of intervention after judgment to appeal an adverse class determination.

nied appellate review of the district court's interlocutory (and erroneous) order, even when their representatives had been denied interlocutory review and had indicated—at least until after final judgment—that they would continue to represent the class on appeal. The timeliness of her intervention to obtain such review hinges not on the time constraints on bringing an independent action, as in *American Pipe,* but on when her representation in the pending suit became inadequate. *NAACP* v. *New York,* 413 U.S. 345, 367 (1973); *Jimenez* v. *Weinberger,* 523 F.2d 689, 695-97 (7th Cir. 1975); *Hodgson* v. *United Mine Workers,* 473 F.2d 118, 130 (D.C. Cir. 1972). As the court below correctly held, that occurred when the named representatives announced after final judgment that they would not pursue efforts to appeal the class denial any further. (A17). *American Pipe,* where the interveners sought to become co-plaintiffs and acquiesced in the adverse class determination, is thus inapposite.

In addition, the conventional four-year limitations provision, 15 U.S.C. § 15(b), involved in *American Pipe* is in no way comparable to the "statute of limitations" (Pet. 7 & n.4) relied on by petitioner, Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e). This provision refers only to timely exhaustion of an administrative remedy by the filing of an EEOC charge. There is no dispute here that this requirement was satisfied by the named plaintiffs.[4] And

[4] The administrative exhaustion requirement had been satisfied when Ms. Romasanta filed her grievance with the EEOC on July 25, 1967. Respondent's limitations argument confuses the 180-day period in which to exhaust the grievance mechanism under Title VII with what is the true limitation under the Act, the then 30-day period proscribed by section 706(f) of the Act, 42 U.S.C. §2000e-5(f), in which suit must be brought after a right to sue letter issues. This judicial limitations period in this matter was satisfied for the class when Carol Romasanta filed suit on May 15, 1970, 28 days after she received her right to sue letter.

in agreement with this Court and the decisions of other circuits, the court of appeals correctly held (A18 n. 8) that the administrative exhaustion requirement was satisfied once one member of the class had initiated the grievance mechanism.[5] Class-wide satisfaction follows from the class treatment ordered by the decision below (which is not here challenged or before the Court), and so no legitimate limitations problem under Title VII arises in this case.[6]

[5] *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 411 n.8 (1975); *Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711, 720 (7th Cir. 1969); *Macklin* v. *Spector Freight Systems,* 478 F.2d 979, 989 (D.C. Cir. 1973); *United States* v. *Georgia Power Co.,* 474 F.2d 906, 925 (5th Cir. 1973).

[6] Petitioner also claims that the decision in this case will "frustrate the policy of Title VII to encourage conciliation and voluntary settlement." (Pet. 11). But any "settlements" which trade away relief to those who have suffered from unlawful employment discrimination should be frustrated.

In addition petitioner's own conduct demonstrates that the rule it urges is not needed to advance settlements. Here, United settled with plaintiffs with no assurances whatsoever that they would refrain from ultimate appeal of the adverse class determination. There is nothing in the final judgment order surrendering the appeal right (A9-12), and in fact the decision not to appeal was not finally made until two weeks after final judgment. (A15). If petitioner had wanted assurances that plaintiffs would not appeal, it could have tried to negotiate for a term making the payment of the settlement funds conditional until the time for appeal had passed. Petitioner's willingness to enter into this settlement with no such assurances belies its argument.

CONCLUSION

Intervention after judgment for the purpose of taking an appeal is an old and well-established procedural device. See, e.g., *Smuck* v. *Hobson,* 408 F.2d 175, 181-82 (D.C. Cir. 1969); *Arizona* v. *Hunt,* 408 F.2d 1086, 1092 (6th Cir.), *cert. denied,* 396 U.S. 845 (1969); *Pellegrino* v. *Nesbit,* 203 F.2d 463 (9th Cir. 1953); *Wolpe* v. *Poretsky,* 144 F.2d 505, 508 (D.C. Cir. 1944); *United States Casualty Co.* v. *Taylor,* 64 F.2d 521, 526-27 (4th Cir. 1933); *American Brake Shoe & Foundry Co.* v. *Interborough Rapid Transit Co.,* 3 F.R.D. 162 (S.D.N.Y. 1942). Cf. *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 ~~F.2d~~ U.S. 129, 134-36 (1967) (intervention after judgment to formulate decree). See generally 3B *Moore's Federal Practice* ¶24.13, at 527-28 & nn. 15, 16 (1976); Wright & Miller, *Federal Practice and Procedure* §1916, at 582-83 & n.14 (1972). Intervention here was timely as that phrase is used and understood in Rule 24, and nothing in *American Pipe,* which does not involve intervention to take an appeal, is to the contrary. *American Pipe* is inapposite, and it is therefore respectfully submitted that a writ of certiorari be denied.

Respectfully submitted,

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